Supreme Court, U.S.
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No. 96-359

In The

Supreme Court of the United States

October Term, 1996

E. B. ROOD and R. BRUCE MCLAUGHLIN,

Petitioners,

v.

THE CITY OF OLDSMAR, a Florida Municipal Corporation, and THOMAS PINTA and NICK STASZKO,

Respondents.

On Petition For A Writ Of Certiorari To The District Court Of Appeal Of The Second District Of Florida

RESPONDENTS' BRIEF IN OPPOSITION

FRAZER, HUBBARD, BRANDT & TRASK

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LIST OF PARTIES

The Petitioners are E.B. Rood and R. Bruce McLaughlin.

The Respondent, City of Oldsmar, is correctly identified in Petitioners' caption except that Thomas Pinta and Nick Staszko, as defendants/appellees below, are also Respondents to this Petition.

Each of the Respondents join in this Brief in Opposition.

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STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. §1257(a) (1995). In addition to the untimeliness of this Petition, the Petition does not involve a judgment from the highest court in which a decision could be had and does not involve federal questions which were presented to and passed upon by the Florida courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no federal constitutional provisions, treaties, statutes, or regulations involved in this case. The sole issue determined by the Florida courts is whether the Petitioners stated a cause of action as a matter of state law.

STATEMENT OF THE CASE

Respondents agree, in general, with Petitioners' Statement of the Case except as follows. The Petition states that "[a]t all times material hereto, the lands of Rood and McLaughlin were zoned General Commercial and Residential Planned Development at 7.5 units per acre." (Petition at page 4). This statement is materially misleading and patently false.

Prior to the City of Oldsmar's adoption of its Comprehensive Plan in 1980, the subject properties were

zoned as Petitioners indicate. However, under the Comprehensive Plan the subject property was designated as Medium Density Residential (Rood) and Open Space (McLaughlin). (Petition at page 5). Petitioners admit that, under Florida law, the Comprehensive Plan superseded all previously adopted zoning ordinances. *Id.* Petitioner Rood acquired his portion of the property at issue in 1982 and Petitioner McLaughlin acquired his portion of the property involved in this case in 1992. Thus, at no time during the ownership of either Petitioner was the subject property zoned as Petitioners would suggest.

Furthermore, Respondents would supplement Petitioners' Statement of the Case as follows. It is unnecessary to enumerate the entire procedural history of Petitioners' suit against the Respondents. Suffice it to say the trial court dismissed with prejudice seven counts of Petitioners' Third Amended Complaint for failure to state a cause of action and let stand four counts from that Complaint. Petitioners appealed the dismissal of the seven counts from the Third Amended Complaint. Prior to resolution of that appeal, Petitioners attempted to comply with the Order of the trial court and filed a Fourth Amended Complaint. The trial court ultimately dismissed the Fourth Amended Complaint with prejudice, again on procedural grounds.

Based upon the procedural posture of the case, the Second District Court of Appeal affirmed in part and reversed in part the trial court's dismissal with prejudice

of the Fourth Amended Complaint. The instant Petition ensued.

ARGUMENT

The question presented for review in the Petition states as follows:

> Whether the District Court of Appeal failed to follow the mandate found in the Fifth and Fourteenth Amendments to the Constitution of the United States when it reinstated a declaratory judgment action seeking a declaration that comprehensive plan designations were arbitrary and capricious, without reinstating a companion action for damages?

The companion action for damages referenced by the Petition is found at Count IX of the Third Amended Complaint. (Petition at page 9). Thus, the sole issue presented by the Petition is the dismissal of Count IX of the Third Amended Complaint. *Id.* This Court, however, should decline to exercise its certiorari jurisdiction in the case for four reasons. First, the Petition was not timely filed. Second, the Petitioners failed to obtain a judgment from the highest state court in which a decision could be had. Third, the issues involved in this case do not involve a substantial federal question. Fourth, the state courts made their determinations based solely on state grounds.

I

The Petition For Writ Of Certiorari Was Not Timely Filed.

The Petition filed in this case correctly notes that, on July 26, 1996, Justice Kennedy extended the time for the filing of the Petition until September 4, 1996. (Petition at page 3). A Petition is timely filed when it has been mailed with first-class postage pre-paid, and bears a postmark showing the document was mailed on or before the last day for filing (Sup. Ct. R. 29.2). Attached to this response is a copy of the envelope sent to Respondents which contained the Petition. (Respondents' Appendix at A-1). The original envelope has been lodged with the court. It is clear, from the postmark on the envelope that the Petition was not mailed until September 6, 1996, two days late. Thus, the Petition was not timely filed and should be dismissed.

Furthermore, pursuant to 28 U.S.C. §2101(c) (1995), a Petition for Writ of Certiorari must be filed within ninety days from the entry of the order of the state appeals court. If timely requested, a sixty day extension of time to file the petition is available. Therefore, in no event may any Petition for Writ of Certiorari be filed more than one hundred and fifty days from the entry of the Order of the state appeals court.

In addition to the untimely filing of this Petition, the main point raised in the Petition was not properly preserved or timely filed. The crux of the Petition is that the District Court of Appeal erred in failing to reinstate Count IX of the Third Amended Complaint. (Petition at

pages 8-9). It is clear from the Petition, however, that the Petitioners waived their appeal of the dismissal of Count IX of the Third Amended Complaint when they filed a Fourth Amended Complaint.

In Florida, a party to an appeal loses his right to attack an alleged erroneous ruling when that party consents or acquiesces to the ruling. *Frank Silvestri Investments, Inc. v. Sullivan*, 486 So. 2d 20 (Fla. 5th DCA 1986) (appeal from final judgment of foreclosure mooted and, thus, abandoned when Appellant satisfied the judgment prior to resolution of appeal.); *Holmes v. School Board of Orange County*, 301 So. 2d 145 (Fla. 4th DCA 1974) (one may not assert error upon an action of the trial court in which he has acquiesced.)

On June 17, 1994, the trial court dismissed with prejudice, among other counts, Count IX of the Third Amended Complaint and rehearing was denied by the Court on June 29, 1994. Petitioners filed their Notice of Appeal on July 14, 1994 invoking the jurisdiction of the Second District Court of Appeals (hereinafter "2d DCA"). Subsequently, on July 19, 1994, Petitioners filed their Fourth Amended Complaint in an attempt to comply with the trial court's June 17th Order. The filing of the Fourth Amended Complaint was obvious acquiescence to the trial court's Order thereby waiving their appeal to the dismissal of the Third Amended Complaint.

After the trial court dismissed with prejudice the entire Fourth Amended Complaint, Petitioners filed with the 2d DCA an Amended Notice of Appeal. The Amended Notice of Appeal makes it clear that the Petitioners had waived and/or abandoned their original

appeal and now only sought review of the "Final Order of the Circuit Court Dismissing with Prejudice the Entire Fourth Amended Complaint. . . . " (Respondents' Appendix at A-2).

In addition, it is clear from the 2d DCA's decision that the issue decided by the Court was the dismissal of the Fourth Amended Complaint. In its opinion, after giving a brief history of the case, the 2d DCA determined that dismissal with prejudice of the entire Fourth Amended Complaint was in error. (Petitioners' Appendix at A-11). As the Court stated:

> We therefore reverse the dismissal with prejudice of Counts I, II, III and VI of appellants' fourth amended complaint (Counts I, III, V and XI of the second amended complaint and Counts I, II, IV and XIII of the third amended complaint). We otherwise affirm the dismissal of appellants' fourth amended complaint.

(Petitioners' Appendix at A-12 through A-13). The only reason the court specified the counts it was reinstating in each amended complaint was to eliminate confusion as to the exact counts being reinstated. (Petitioners' Appendix at A-5). Therefore, the Appeals Court made no ruling as to the Third Amended Complaint but confined its decision to the Fourth Amended Complaint.

With regard to Count IX of the Third Amended Complaint, the time for Petitioners to have appealed to this Court began to run on July 19, 1994 when Petitioners filed their Fourth Amended Complaint. Well over one hundred and fifty days elapsed between the abandonment of that appeal and the instigation of the instant Petition. The Petition, insofar as it is premised upon Count IX of the

Third Amended Complaint, is clearly untimely and should be dismissed.

II

The Petitioners Have Failed To Obtain A Decision From The Highest Available State Court

This Court's certiorari jurisdiction is governed by 28 U.S.C. §1257(a) (1995). Pursuant to that section, "[f]inal judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari. . . . " In Florida, a party aggrieved by a final order of a circuit court may, as a matter of right, appeal to the appropriate District Court of Appeal. Fla. Const. Art. V §4; Fla. R. App. P. 9.030(b)(1)(A).

As noted above, the Petitioners abandoned their appeal of the dismissal of Count IX of the Third Amended Complaint when they filed a Fourth Amended Complaint. As a result, the 2d DCA never ruled on the dismissal of said Count IX and the Petitioner never obtained a decision from the highest state court in which a decision could be had. Consequently, this Court lacks certiorari jurisdiction and the Petition should be dismissed. *See Southern Electric Co. v. Stoddard*, 269 U.S. 186.

III

The Petition In This Case Does Not Involve A Federal Question.

It is a basic premise of Supreme Court certiorari jurisprudence that an appeal from a state court must involve an important federal question. *Bankers Life and Casualty v. Crenshaw*, 486 U.S. 71 (1988); *Bowe v. Scott*, 233 U.S. 658 (1913); *National Foundry and Pipeworks, Ltd. v. Oconto City Water Supply Co.*, 183 U.S. 216 (1901). Correspondingly, a Petition for Writ of Certiorari must contain in the Statement of the Case, the exact stage in the proceedings, both in the court of first instance and in the appellate court, in which the federal questions sought to be reviewed were raised, the method or manner of raising them and the way in which they were passed upon by the court, so as to show that the federal question was timely and properly raised. (Sup. Ct. R. 14.1(g)(i)). Petitioners have failed to include these important requirements in their Petition.

In the instant case, no such important federal question is involved. The Petition is focused on the proposition that persons whose property has been temporarily taken by a governmental entity are entitled to compensation. The Respondents have no argument with that basic premise and no Court involved in this case has ruled to the contrary.

As noted above, the sole issue is the dismissal of Count IX from the Third Amended Complaint. The trial court dismissed Count IX with prejudice for the simple reason that the Petitioners could not, after four attempts, state a cause of action for a temporary taking. The trial

court never considered the merits of the case because of fatal repugnancies existing between the pleadings and the attached exhibits. (Petitioners' Appendix at A-21). In a similar fashion, the appeals court stated as follows:

> Since the Appeal may be disposed of *on procedural grounds*, we need not relate the rather complicated facts set forth by Appellants *in their attempt to allege a cause of action* against Oldsmar. (Emphasis supplied).

(Petitioners' Appendix at A-8). Therefore, the only rulings by any Court in this case are on matters of practice and procedure. It has long been the rule that whether pleadings state a cause of action is merely a question of practice and procedure and presents no federal question. *National Foundry, supra,* 183 U.S. at 237; *see also Benz v. New York State Thruway Authority,* 369 U.S. 147 (1962) (matters relating to the jurisdiction of state courts presents no federal question). In the absence of a federal question, the Court is without jurisdiction and the Petition should be dismissed.

IV

The Decisions Of The State Courts Rested Solely On Adequate And Independent State Grounds

In the event the Court should decide that the Petition involves a federal question, the decisions of the state courts rest solely on adequate and independent state grounds. Those decisions do not involve, in any way, the interpretation of any federal statute, federal right or privilege, or the U.S. Constitution.

The standard for whether a state court opinion rests on adequate and independent state grounds was enunciated in *Michigan v. Long*, 463 U.S. 1032 (1983). In *Long*, this Court stated that certiorari jurisdiction attached when:

> a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion. . . .

Long, 463 U.S. at 1040-1041. The standard adopted in *Long* was recently reaffirmed by this Court's decision in *Arizona v. Evans*, 131 L. Ed. 2d 34 (1995).

In the case at bar, it is quite clear from the face of both the trial court and appellate court opinions that their decisions were based solely on state grounds. Assuming, for the purposes of argument only, that the dismissal of the Third Amended Complaint is properly before this Court, the trial court's decision to dismiss was based entirely upon fatal repugnancies between the Complaint and the attached exhibits. (Petitioners' Appendix at A-21). Because of those repugnancies, Petitioners failed, as a matter of state law, to state a cause of action. The trial court cited two state cases, *Namon v. State Department of Environmental Regulation*, 558 So. 2d 504 (Fla. 3d DCA 1990) and *Franz Tractor Co. v. J.I. Case Co.*, 566 So. 2d 524 (Fla. 2d DCA 1990), in support of its decision. (Petitioners' Appendix at A-21 through A-24). At no point in its decision did the trial court cite or allude to any federal law or authority.

In a similar fashion, the appellate court rested its decision entirely "on procedural grounds", which are

matters of state law. (Petitioners' Appendix at A-8, A-11 through A-12). Again, the appellate court neither cited nor alluded to any federal law or authority. Thus, even assuming that the Petition includes a federal question, both the trial and appellate court decisions were based entirely upon state grounds and this Court should decline to exercise jurisdiction.

CONCLUSION

The Petition filed in this case was untimely for two reasons. First, the Petition itself was not filed within the time period prescribed. Second, it is clear from the Petition that Petitioners abandoned their appeal of the dismissal of the Third Amended Complaint in July, 1994 and that the Fourth Amended Complaint contains no claim for damages against Respondents for the allegedly arbitrary and capricious comprehensive plan. This Petition was not initiated until April, 1996. Therefore, the issues raised by the Petition are untimely and the Court should decline to exercise its jurisdiction.

Furthermore, having abandoned their appeal of the Third Amended Complaint, the Petitioners failed to obtain a judgment from the highest state court in which a decision could be had. Finally, the Petition does not involve any federal questions. Rather, under the posture of this case, the issue is one of purely state law; whether the Petitioners stated a cause of action. As such, no federal question was ever pressed by the Petitioners, nor

was any federal question passed upon by the state courts. Therefore, the Court should decline to exercise its jurisdiction in this case and the Petition should be dismissed.

Respectfully Submitted,

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IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA CIVIL DIVISION

E. B. ROOD and R. BRUCE McLAUGHLIN,

Plaintiffs

v.

Case No. 92-3764 CI 7

THE CITY OF OLDSMAR, a Florida Municipal Corporation, THOMAS PINTA and NICK STASZKO, in their individual and personal capacities, and ERIC AGER

Defendants

_____/

AMENDED NOTICE OF APPEAL

NOTICE IS GIVEN that Plaintiffs/Appellants, E. B. ROOD and R. BRUCE McLAUGHLIN, appeal to the Second District Court of Appeal, the final Order of the Circuit Court Dismissing with Prejudice the entire Fourth Amended Complaint rendered the 20th day of October, 1994. A conformed copy of the Order is attached. The nature of the Order is a final order Dismissing with Prejudice the Fourth Amended Complaint herein.

Respectfully submitted,

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I hereby certify that a true copy of the foregoing has been furnished by regular United States Mail to: Bryan Kutchins, Esq., P.O. Box 1063, 1000 State Road 584, Oldsmar, Fl., 34677, and to Eric Ager, 3375 Hunt Club Drive, Clearwater, Fl., 34621, this 29 day of October, 1994.

/s/ E. B. Rood
E. B. Rood